Supreme Court U.S.
FILED
MAR 19 2002

(3)

No. 01-1062

In The

Supreme Court of the United States

OCTOBER TERM, 2001

RUSTY ROBERTS, ET AL
Petitioner

v.

CARDINAL SERVICES, INC.; ET AL
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' BRIEF IN REPLY

Louis R. Koerner, Jr.
Koerner Law Office
1204 Jackson Avenue
New Orleans, LA 70130-5130
Phone (504)581-9569

Of Counsel:
C. Arlen Braud, II
Michelle O. Gallagher
Braud & Gallagher, L.L.C.
506 Water Street, Suite A
Madisonville, Louisiana 70447
Phone (985) 845-0372

March 18, 2002

148

PURPOSE OF THIS REPLY BRIEF

In its brief in opposition, Respondent makes a number of statements that are not supported by the record and fails to direct the attention of the Court to *Buford v. Cardinal Services, Inc.*, 01-0738 (La.App. 3 Cir, 12/12/01); 801 So.2d 1269, a case involving Respondent and its counsel and legal issues almost identical to those before the Court that is adverse to Cardinal's position and was decided prior to the filing of its brief in opposition.

In addition, Respondent fails to address Questions 2 and 3 concerning the impact of the change in employment circumstances presented by the purchase by Cardinal of an extensive fleet of liftboats and the exclusive use of this fleet of liftboats by Roberts and by Buford for more than a year prior to the accident and by Roberts' promotion to P & A operator and his new and additional duties.

TABLE OF CONTENTS

PURPOSE OF THIS REPLY BRIEF	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
ARGUMENT	1
FAILURE TO CITE CONTROLLING AUTHORITY	1
THE IMPORTANCE OF THE *BUFORD* CASE	1
CCARDINAL HAS MISSTATED THE RECORD	2
A. Robert's Job Duties Changed Upon Promotion	2
B. The Work Was Dangerous and Took Roberts to Sea	5
C. Misstatements in the Opposition Brief	5
D. Inaccuracies in Cardinal's Depiction of Roberts' Work Record	6
CONCLUSION	7

TABLE OF AUTHORITIES

CASES	PAGE:
Buford v. Cardinal Services, Inc., 01-0738 (La.App. 3 Cir, 12/12/01); 801 So.2d 1269	1, 2, 7
Chandris v. Latsis, 515 U.S. 347, 366, 115 S.Ct. 271 132 L. Ed. 2d 314 (1995)	7
Continental Laboratory Products, Inc. v. Medax International, Inc., 1999 U.S. Dist (SD Cal. 1999)	1
Southern Pacific Transportation Co. v. Public Utilities Commission, 716 F.2d 1285 (9th Cir. 1983)	1
In the Matter of Thonert, 733 N.E.2d 932, (Ind. 2000)	1

ARGUMENT

FAILURE TO CITE CONTROLLING AUTHORITY

Respondent's brief in opposition fails to cite *Buford v. Cardinal Services, Inc.*, 01-0738 (La.App. 3 Cir, 12/12/01); 801 So.2d 1269, even though its holding and reasoning, as discussed hereinafter, are directly adverse to the position of Cardinal, and the case was not disclosed by Petitioners. This violation of the duty of candor toward this tribunal (Louisiana State Bar Association, Rules of Professional Conduct, Rule 3.3(a)(3), *Continental Laboratory Products, Inc. v. Medax International, Inc.*, 1999 U.S. Dist. LEXIS 15383, *46-49 (SD Cal. 1999)) is particularly egregious since not only is the client, Cardinal, the same but the attorney (Duncan) is also the same. *Southern Pacific Transportation Co. v. Public Utilities Commission*, 716 F.2d 1285, 1291 (9th Cir. 1983); *In the Matter of Thonert*, 733 N.E.2d 932, 932-34 (Ind. 2000).

THE IMPORTANCE OF THE BUFORD CASE

Buford was a wireline helper employed by Cardinal who served exclusively aboard Cardinal liftboats and other Cardinal vessels, and also worked, as did Roberts, on stationary platforms and in the Cardinal shop for a substantial percentage of his work time. In reversing the summary judgment granted by the district court, the Louisiana court of appeal found that Buford's duties, including cleaning up the work area and platform, lubricating and painting, which were performed on land, on fixed platforms, and on vessels, could be considered to contribute to the mission of the vessel, *Buford*, 801 So.2d at 1274-75, and the vessel to contribute to the success of the wireline mission, *Buford*, 801 So.2d at 1275, and that Buford was "doing the ship's work," *Buford*, 801 So.2d at 1275. It noted that seaman status to wirelíners under certain conditions had been conceded by Cardinal's counsel at oral argument. *Buford*, 801 So.2d at 1273.

That court also found that Buford's "work necessarily took him to sea to various platforms locations, notwithstanding the fact

that he was flown by helicopter to the platform" where he was hurt. *Buford*, 801 So.2d at 1276.

The *Buford* court properly analyzed Buford's entire employment with Cardinal, which appears to have been co-terminus[1] with that part of Roberts' employment during which he was solely assigned to Cardinal vessels and not to any third party vessels. This examination necessarily considered all five of those Cardinal vessels and found that, despite substantial shop and platform-only duties, Buford's seaman status was an issue for the jury and was not suitable for summary judgment. *Buford*, 801 So.2d at 1277. Although the *Buford* court considered that it was likely that a jury would find that Buford spent more than the thirty percent so often mentioned, it did not find that this number had any special magic.

> Given the facts of this case, we conclude that a reasonable jury could find such hazardous exposure if it first found that Mr. Buford fell short of the 30 percent duration requirement of the second prong. Again, we make this point only as an aside, and reiterate again that we believe that a reasonable jury could find that Mr. Buford has met the 30 percent requirement and the two-part, conjunctive test for seaman status. *Buford*, 801 So.2d at 1278.

CARDINAL HAS MISSTATED THE RECORD

A. Robert's Duties Changed When He Became an Operator

Roberts was hired as a P & A helper at $7.50 per hour to do whatever they are asked to do, weld, work on equipment, work for wireline, or "go work for jackups or work for whoever, whatever they want you to do." (Roberts, R-865.) As described by the P & A supervisor, Lott, a P & A helper is someone who has done manual labor and is willing to work, and preferably one who

---

[1] Roberts was injured on May 21, 1998. Buford was injured in June 11, 1998.

is willing to learn other jobs and move up (Lott, R889).

Accordingly, when Roberts was officially promoted to P & A operator (Roberts, R840) on September 9, 1997, effective September 8, 1997 (Roberts, R840), under circumstances in which he had done operator's work for several months before (Roberts, R840, 842), his job duties changed (Roberts, R849), and he got a raise (Lott, R905b).

Roberts' promotion to P & A operator, *de facto*, by mid July, 1997 and effective in September, 1997, had a dramatic effect on the percentages that he spent on vessels. Even using Cardinal's location and vessel assumptions (RA1-4) (which, as will be seen, *infra,* are suspect and also contain arithmetic errors), Roberts' percentages of non-Cardinal vessel hours and duties drop remarkably to 56.19% and 55.87% respectively, thus placing Roberts on Cardinal's fleet of vessels at 43.81% (July, 1997) and 44.13% (September, 1997) and substantially in excess of the thirty percent guideline established by this Court.

After the acquisition of additional vessels by Cardinal (Roberts, R863, 891b) and the policy of Cardinal to use its equipment and services as much as possible (Lott, 891b), the duties of Roberts, who considered himself as a member of an integrated Cardinal team, changed dramatically as a practical matter, and he ceased doing exclusively P & A work (R866-56, salvage; R857, integrated services; R863, and wireline or coil tubing, R859 and R866, 867 (all Roberts), which were entirely different businesses from P & A work, Lott, R886b, 887, 889b).

On a job in October of 1997, the operators of the E.J. HENRY, a Cardinal jackup, nearly sank the vessel because the hatch was left open while jacking down and Roberts, then a P & A operator, had to put on a life vest and go into the water to cut the things loose that were preventing the jackup from retracting its legs, being stuck in the mud, and capsizing (Roberts, R854-55).

After he became an operator, Roberts would do deckhand

work on the Cardinal jackups, which he had never done on the third-party jackups, that included cleanup, moving things to balance the weight, and fixing the hydraulic lines on the crane (Roberts, R863-64).

> If it is not Cardinal, no, that's what they've got deckhands for. I mean if we leave big pieces of metal, yes, we pick that up, but as far as cleaning them, no, that's not our company. That's what we pay them for, you know. They got a deckhand, that's his job, that's what he gets paid for. That is not part of our company (Roberts, R864).

At Opp. p. 3, it is stated that "on those occasions where Mr. Roberts worked other than on a fixed platform where no vessel was involved or in the cardinal shop or yard, he still performed strictly P&A operator duties and never worked as a crew member of any vessel." The cited record support is R857, 864, 877, 880, 881, 913, 932, 938 b, 939.

R857, a part of the Roberts' deposition (pp. 270-273),concerns the fact that Roberts worked with Cardinal for an integrated team with the E line, slickline, P & A, coil cubing, and a Cardinal boat and that the integrated services were new at that time. It also concerns the fact that Mr. Roberts worked as a deckhand on a jackup on one or two occasions because there was an emergency with the regular deckhand.

R864, Roberts' deposition pp. 298-301, concerns the fact that in addition to the one experience when Roberts was a deckhand on a jackup, he had done deckhand work on Cardinal vessels, including mechanic work, that was not just helping out. A description of the deckhand work is also given on that page. R877, 880 and 881 are pages from the self-serving affidavit of Lott that are not supported by his deposition. R 913 assumes that Roberts did exclusively P & A work. R938, 939b do not seem to apply to Roberts' many tasks after he became an operator.

At Opp. p. 4, it is stated that "Petitioner's argument that Cardinal had a "change in the employer's method of working" by

using its own vessels, as opposed to third party vessels, is *non sequitur*. This does not create a 'new assignment' for Mr. Roberts as his duties as a P&A employee never changed during his entire tenure with Cardinal." As discuss, *supra*, the citations to R 880, 912(b) and 913 do not change the new and additional duties assigned to and undertaken by Roberts.

B. The Work Was Dangerous and Took Roberts to Sea

A liftboat is "an elevating, self-elevating work platform. The boat has the ability to transit to any location, waterborne location, and elevate itself out of the water. And when that happens, it provides a stable work platform in which to work off of out of the sea condition. It can jackup anywhere to platforms, anywhere it wants really." It is self-propelled, and has sleeping quarters and a galley to eat.(Dale James Mitchell, Cardinal Marine Division manager, R936b).

Roberts' work as operator, as described, *supra*, was dangerous. P & A orientation included one day on water survival (Lott, R888b). For a job for Burlington Resources, the salvage of an entire group of platforms meant the substitution of a second Cardinal liftboat that was larger and a mid-Gulf transfer of men and equipment (Roberts, R857-59, 862-63) He was injured on April 30, 1997 when a rusty door came off of its hinges on a platform that was to be decommissioned (Roberts, R851-52). He was warned not to touch the crane of a Gulf Island liftboat because it had collapsed before (Roberts, R850-51).

C. Other Misstatements in the Opposition Brief

Although Cardinal avers that P & A work can be done on land, this is not supported by the record, which demonstrates that it is done by Cardinal on offshore platforms by cutting the drill casings twenty feet beneath the mud line and cementing them off, after salvaging everything that could be salvaged (R863).

At Opp p. 3, it is stated that "reference to Mr. Roberts as an 'offshore construction worker' is inaccurate. It was undisputed in

the lower court that the work of P&A employees was to shut down and plug oil and gas wells." In order to justify this statement, Respondent cites R838, 880, 912b, 913, 916.

R838 is a part of the Roberts' deposition (202-205), which concerns when the Cardinal's office where Roberts worked was moved from Houma, Louisiana to Gray and also refers to Roberts' job with the P & A department. A description of his work is also given on this page. There is no discussion of onshore P & A work or any of the other jobs and duties that Roberts had. R880 again assumes that Roberts only did P & A work, as do the repeated citations to R912b, 913, and 916.

D. Inaccuracies in Cardinal's Depiction of Roberts' Work Record

Although Cardinal suggests that the chart and percentages of work performed by Roberts is gospel, the summary of Roberts' work attached as Exhibit B to the motion for summary judgment (R955-58), Appendix RA hereto, is not entirely consistent with Roberts payroll records, and the summary used by Respondent and the courts below contains arithmetical errors.

The lack of precision in determining whether a liftboat was present or used that is referenced in Lott's testimony (R890b, 891b-92, 892-892b, 895b-896b) also resulted in determinations of whether or not there were liftboats that were fudged in favor of non-vessel work and were contrary to Roberts' definite recollection (Roberts, R843-45).

Whether Roberts' working in the Cardinal shop when offshore work was not available or during his normal time off (Roberts, R863, Lott, R891) detracted from his seaman status is an issue for the jury.

There were a number of occasions, not recorded in the Cardinal records, where Roberts acted as a deckhand prior to his promotion (Roberts, R857) and for the wireline or coil tubing departments afterwards (Roberts, R859, 863, 938b).

Moreover, Cardinal characterizes as shop time 247.23 hours that were spent on light duty in the shop after Roberts' injury on April 30, 1997 (Roberts, R851-52). This is almost five percent of his total working hours and is therefore material, since it would substantially impact the percentages urged by Cardinal

CONCLUSION

Given the varying ways in which Roberts' employment record with Cardinal could be characterized, his promotion to operator and the additional responsibilities and varied duties, and the simultaneous dramatic shift from the use of third party vessels to exclusively Cardinal vessels that was coincident with Cardinal's substantial acquisition of additional liftboats as well as the completely opposite result reached in the factually and legally indistinguishable *Burford* case, the writ in this case should be granted. This would also permit clarification of this Court's decision in *Chandris v. Latsis,* 515 U.S. 347, 115 S.Ct. 2172, 2190, 132 L.Ed.2d 314 (1995). Petitioners therefore request that this Court grant their Petition for Certiorari.

KOERNER LAW FIRM
Louis R. Koerner, Jr.
Louisiana Bar 7817
1204 Jackson Avenue
New Orleans, Louisiana 70130-5130
Telephone: (504) 581-9569
Telecopier: (504) 566-0546
email: louis@koerner-law.com
URL: http://www.koerner-law.com

C. Arlen Braud, II
Michelle O. Gallagher
Braud & Gallagher, L.L.C.
506 Water Street, Suite A
Madisonville, Louisiana 70447
Phone (985) 845-0372

RA1

SUMMARY OF RUSTY ROBERTS' WORK HISTORY
WHILE EMPLOYED BY CARDINAL SERVICES, INC.
FROM NOVEMBER 25, 1996 THROUGH MAY 21, 1998

Payroll Dates	Nov. 18 – Dec. 1 - 1996	Dec. 2 – Dec. 15 1996	Dec. 16 – Dec. 29 1996	Dec. 30 – Jan. 12	Jan. 13 – Jan. 26 1997	Jan. 27 – Feb. 9 1997	Feb. 10 – Feb. 23 1997	Feb. 24 – March 9 1997	March 10 – March 23 1997
Shop Time	27.58	14.20	9.60	66.07	29.0	78.21	126.26	51.51	35.20
Plug & Abandonment work on Platform with no vessel	0	0	0	0	156	52.0	0	0	0
Plug & Abandonment Work on Platform with 3rd party vessel adjacent to platform	0	172	142	29.0	0	0	0	132	124
Plug & Abandonment Work on Platform with Cardinal Lift-boat vessel adjacent to platform	0	0	0	0	0	0	0	0	0
Travel Time to and from job site	0	8	12	0	2	0	0	1	3

Payroll Dates	March 24 – April 6 1997	April 7 – April.20 1997	April 21 – May 4 1997	May 5- May 18 1997	May 19 – June1 1997	June 2 – June15 1997	June 16 – June 29 1997	June 30 – July 13 1997	July 14- July 27 1997	July 28- August 10 1997
Shop Time	0	27.08	19.20	91.99	130.04	69.74	24.12	51.26	43.42	0
Plug & Abandonment work on Platform with no vessel		73	154	0	41	56	123	40	39	0
Plug & Abandonment work on Platform with 3rd party vessel adjacent to platform	114	53	0	0	0	0	0	0	0	0
Plug & Abandonment work on Platform with Cardinal lift-boat vessel adjacent to platform	0	0	0	0	0	0	0	0	116	159
Travel time to and from job site	3	3	0	0	0	3	2	0	3	0

RA2

SUMMARY OF RUSTY ROBERTS' WORK HISTORY
WHILE EMPLOYED BY CARDINAL SERVICES, INC.
FROM NOVEMBER 25, 1996 THROUGH MAY 21, 1998

Payroll Dates	Aug. 11 – Aug. 24 1997	Aug. 25 – Sept. 7 1997	Sept. 8 – Sept. 21 1997	Sept. 22 – Oct. 5 1997	Oct. 6 – Oct. 19 1997	Oct. 20 – Nov. 2 1997	Nov. 3 – Nov. 16 1997	Nov. 17 – Nov. 30 1997	Dec. 1 – Dec. 14 1997
Shop Time	4.91	0	4.07	18.52	100.62	0	0	26.23	55.02
Plug & Abandonment work on Platform with no vessel	150	119	107	0	0	145	236	66	42
Plug & Abandonment work on Platform with 3rd party vessel adjacent to platform	0	0	0	0	0	0	0	0	0
Plug & Abandonment work on Platform with Cardinal lift-boat vessel adjacent to platform	0	0	0	129	21	0	0	0	71
Plug and abandonment work on the Cardinal vessel, CARDINAL 1	0	0	0	0	0	0	0	25	0
Travel time to and from job site	10	3	8	4.5	4.5	3	0	8	8

000937

RA3

SUMMARY OF RUSTY ROBERTS' WORK HISTORY WHILE EMPLOYED BY CARDINAL SERVICES, INC. FROM NOVEMBER 25, 1996 THROUGH MAY 21, 1998

Payroll Dates	Dec. 15 – Dec. 28 1997	Dec. 29 – Jan. 11	Jan. 12 – Jan. 25 1998	Jan. 26 – Feb. 8 1998	Feb. 9 – Feb. 22 1998	Feb. 23 – Mar 8 1998	Mar. 9 – Mar. 22 1998	Mar. 23 – April 5 1998	April 6 – April 19 1998
Shop Time	0	10.60	0	0	0	7.02	45.96	22.26	14.38
Plug & Abandonment work on Platform with no vessel	30	0	0	0	37	56.5	0	134	0
Plug & Abandonment work on Platform with 3rd party vessel adjacent to platform	0	0	0	0	0	0	0	0	26
Plug & Abandonment work on Platform with Cardinal lift-boat vessel adjacent to platform	96	108	12	177	72	79	42	0	119
Plug and abandonment work on the Cardinal vessel, CARDINAL 1	0	0	0	0	0	0	0	0	26
Travel time to and from job site	10	6	0	0	3	0	0	0	3

RA4

8 5 6 3 9 3

SUMMARY OF RUSTY ROBERTS' WORK HISTORY WHILE EMPLOYED BY CARDINAL SERVICES, INC. FROM NOVEMBER 25, 1996 THROUGH MAY 21, 1998

Payroll Dates	April 20 – May 3 1998	May 4 – May17 1998	May 18 – May 31 1998	
Shop Time	0	3.09	0	
Plug & Abandonment work on Platform with no vessel	0	184	66	
Plug & Abandonment Work on Platform with 3rd party vessel adjacent to platform	0	0	0	
Plug & Abandonment Work on Platform with Cardinal Lift-boat vessel adjacent to platform	176	30	0	
Travel time to and from job site	2	0	0	